United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-2511

To be argued by
THOMAS R. PATTISON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2511

UNITED STATES OF AMERICA,

Appellee,

—against—

MILTON BERLINER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant Milton Berliner appeals from a judgment of conviction entered October 18, 1974, following a jury trial held before the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York. Appellant was convicted on each of four counts charging income tax evasion and the filing of perjurious income tax returns in 1966 and 1967.

Count One alleged that appellant attempted to evade income taxes by understating his income by some $25,321.69 in 1965, in violation of T. 26 U.S.C., § 7201. Count Two involved the tax year 1966, and alleged an attempted evasion of taxes by understating income in the amount of $149,750.50. Counts Three and Four charged the appellant with the filing of perjurious income tax returns for each of these two years; the perjury arising out of the above understatement of taxable income, in violation of T. 26 U.S.C., § 7206(1).

Appellant was sentenced to two years imprisonment on each count, to run concurrently, to serve four months imprisonment, the balance of the sentence suspended, and 3 years probation. A special condition of the probation was that appellant was to pay his tax liability. Appellant is free on bail pending this appeal.

Appellant's sole point on this appeal is that Judge Platt abused his discretion by improperly limiting the defense summation.

Statement of Facts

A. The Government's direct case.

In light of the narrow issue raised on this appeal, a brief recitation of the facts will be sufficient to demonstrate both the overwhelming evidence of guilt adduced at trial and also the circumstances surrounding the alleged error.

(1)

Appellant Milton Berliner began his association with Irving, Jack and Mark Talve, and their stainless steel sales business, in 1948, when he was retained as an accountant for the I.D. Talve Trading Corporation (T. 24).* This relationship continued until 1963, when the appellant was appointed full time comptroller for the Talve firms, which by then included, in addition to the I.D. Talve Trading Corporation, Franklin Processing Corporation, the Franklin Stainless Corporation, Laurel Metals and Inox Metals (T. 21, 26). Although nominally the corporations' accountant, appellant performed a multitude of services for these companies, including union negotiations, sales work which involved many foreign trips, developing new sources of supply, and evaluation of diversification possibilities. In

* Page references in parenthesis refer to the trial transcript.

general, appellant functioned as a de facto partner in all areas of the companies' business (T. 27).

Shortly after his assumption of the position of comptroller, tensions began to arise between the Talves and appellant which ultimately lead to a complete parting of the ways in May of 1966. Irving Talve cited appellant's lack of attention, inefficiency, absences and erratic behavior in general (T. 34). As the companies had expanded and prospered, appellant's importance to them increased proportionately and, in light of his knowledge of all aspects of the business, this inattention began having a serious effect (T. 164). Accordingly, sporadic discussions concerning appellant's severance were commenced in 1963 or 1964 (T. 31). These discussions centered around the amount to be paid appellant for his prior services to the companies. At one time there had been discussion of appellant becoming a part owner of the corporations, but this was never consummated (T. 33). In addition, the Talves were concerned that Berliner might misuse certain trade secrets acquired over the years (T. 29-30).

Appellant demanded $500,000, or 25% of the companies' value, but this was viewed by the Talves as outrageous and was rejected (T. 33, 34). Finally, in the middle of 1966, a final agreement was reached under which appellant would receive $125,000 in cash (T. 34). In addition, while these discussions were being held during 1965 and 1966, incidental payments were made to appellant which, although no final sum had been agreed on, were recognized by the parties as being far less than what the final figure would ultimately be. It was understood that those incidental sums would be applied toward the final severance package (T. 34-35). Accordingly, the following checks drawn on the various Talve Corporations were issued to appellant during 1965: a check dated January 8, 1965 in the amount of $500.00 (T. 39; Gov't. Ex. 3); a check dated February 3, 1965 in the amount of $3,500 (T. 38; Gov't. Ex. 4); a

check dated March 5, 1965 in the amount of $100.00 (T. 38; Gov't. Ex. 5); a check dated May 15, 1965, in the amount of $3500 (T. 36; Gov't. Ex. 6); and a series of checks payable to First National City Bank to repay personal loans of appellant (T. 41-44); i.e., June 22, 1965, $2,438.88 (Gov't. Ex. 7); August 31, 1965, $3,463.68 (Gov't. Ex. 8); September 10, 1965, $2,006.7 (Gov't. Ex. 9).

None of the incidental 1965 payments, totaling $15,509.53, were declared on appellant's 1965 tax return (Gov't. Ex. 1). In addition, appellant had received accounting fees from private clients other than the Talves in 1965 in the amount of $11,162.16, which he also failed to report (T. 352-353, 356; Gov't. Exs. 25 and 26).*

During 1966, and pursuant to the same arrangement, appellant received the following checks from the Talve companies: a check dated January 11, 1966 in the amount of $10,000; a check dated February 15, 1966 in the amount of $10,000; a check dated February 15, 1966 in the amount of $7,147; a check dated April 4, 1966 in the amount of $6,000; and a check dated May 1, 1966 in the amount of $6,000 (T. 46-48; see respectively, Gov't. Exs. 10-14).

Mindful of the above advances made over the prior year and a half, the Talve brothers, in June of 1966, finally negotiated a closing severance package in the amount of $125,000 (T. 34). This was paid to appellant as follows: checks in the amount of $50,000 on June 14, 1966; $25,000 on July 14, 1966; $25,000 on August 12, 1966; and $8,500 on December 31, 1966 (see respectively, Gov't. Exs. 15-18). In addition, appellant received $500 weekly salary checks from May until the end of 1966, although he did not perform any further services as of May, 1966 (T. 51-55).**

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* Appellant's reported taxable income for 1965 was $12,042.48. Thus, appellant failed to report more than two-thirds of his taxable income for that year.

** In addition to Irving Talve, his brothers Jack and Mark, also testified to the above severance arrangement (T. 101-224, 227-289).

None of the above severance checks received by appellant during 1966 and totaling $147,647 were declared on appellant's 1966 income tax return (Gov't. Ex. 2).* Moreover, private accounting fees in the amount of $4,853.50 that he received during 1966 were also unreported by appellant (T. 351-353, Gov't. Ex. 26). Thus, appellant failed to report more than ninety percent of his taxable income for the year 1966.

(2)

After appellant's termination in May, 1966, Abraham Spector, a certified public accountant and a member of the firm of Sperduto, Priskie, Spector, Greenhut and Futterman, was retained by the Talves to handle the books and also to file the 1965 and 1966 tax returns for the corporations, which had not been filed by appellant and which were on final extension, due June 15, 1966 (T. 294-295). Spector's examination of the corporate books showed that the severance payments to appellant had been treated by appellant on the corporate accounts as entries in either the "legal and professional" account or the "loans and exchange" account (T. 300-308; Gov't. Exs. 21 and 22).

Mr. Spector offered into evidence the general ledger of the corporations showing how the severance payments had been handled by appellant (T. 295-308). Concerning the alleged "Mysterious $295,264.95" (App. Br. p. 13), Mr. Spector testified that the only materials he had to work with when assuming responsibility for the accounting work of the firm was a trial balance indicating that the opening balance for the fiscal year beginning October 1, 1964 showed accounts payable of $295,264.28. The balance sheet had been prepared by appellant and turned over to Spector. Subsequent investigation by Spector, however, disclosed that the company had accounts payable of only $195,264.28

* Appellant did, however, report the weekly salary checks.

and thus, the 295 thousand dollar figure was simply incorrect (T. 343).* Spector then, in 1966, made an accounting entry adjustment to the balance of 1966, which had the effect of leaving the books showing a $100,000 difference between the closing balance of 1965 and the opening balance of 1966 (T. 310, 343, 348-350).

Mr. Spector further testified as to his reasons for not claiming the severance payments as a corporate tax deduction when he prepared the tax returns for 1965 and 1966. According to him, it was impossible to tell whether or not these payments had been included in a larger liability account which had already been deducted in a prior year. Therefore, using the "conservative approach" (T. 315), he determined that the corporation could not deduct the payments since it appeared probable that they had already been taken (T. 309-315).

B. The defense case.

Appellant testified at length that he had loaned large sums of money personally to Irving Talve, as well as having advanced large sums of money to the corporation over the years, and that the payments received by him were reimbursement of these monies. He had no records of these loans or advances, other than a large hand made chart which he made purportedly listing year by year the loans advanced by him, and some checks made out to cash which, after encashment, according to appellant were used to loan cash to the Talves. In addition, he introduced in evidence miscellaneous checks to company employees, correspondence from foreign lawyers and banks addressed to him at his private accounting office, at 112 West 42nd Street, New York, New York and finally, extracts from his bank statements showing otherwise unexplained withdrawals (T. 519-

* This investigation consisted of a bill by bill analysis of each account payable the company had (T. 343).

527, 530-537, 510, 723, 724; Def. Exs. CC, S, T, V, W, X, R, Y).

Appellant testified that mail relative to certain foreign corporations was sent to him at his private office in order to avoid any ostensible connection between the foreign corporations and the Talves (T. 627). In an effort to corroborate this and also to show that he advanced his own money on behalf of these corporations, appellant offered to introduce in evidence a letter from an Italian law firm relative to a land acquisition in Italy (T. 626-659; Def. Ex. DD). After a lengthy colloquy and a voir dire outside the presence of the jury, the Court admitted the letter with a specific instruction to the jury, that it was to be considered by them for the limited purpose of showing that appellant negotiated a purchase in Italy for an Italian corporation, Cias, but that it shed no light whatsoever and was not to be considered on the issue of the source of the funds used (T. 658-659). Similarly, when the defendant offered additional letters into evidence (Def. Exs. GG-1-GG-5; App. 12a-18a) the only supporting testimony and foundation laid indicated that they were air mail envelopes postmarked from Lausane, Switzerland, on various dates in 1966 and received at appellant's office (T. 699).* The envelopes and the contents were admitted into evidence with the same caveat as that given the jury earlier (T. 700). Not a word of testimony was elicited concerning the substance of the letters, their meaning, or anything relative to their contents. Immediately after their introduction, defense counsel proceeded to other areas in his examination of appellant (T. 700, et seq.).

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* These letters refer to a transfer of funds from the account of Dorvolto, a foreign corporation, to New York. This was done pursuant to a request (presumably from appellant, although no testimony was elicited by defense counsel concerning it) on March 4th 1966 (App., 12a-18a).

Berliner further testified under cross-examination that, in his view, the accounts payable ledger sheets (Gov't. Ex. 21) showed a "negative accounts payable" of some $295,000. (T. 868, T. 938).

Appellant testified that his source for the $170,000 allegedly loaned to the Talves and their companies came from a variety of sources including his personal savings account, loans taken out by [illegible] various banks, gifts in the amount of $3,000 per [illegible] 1952-1961 from his deceased father, a gift from one [illegible]as Britenbach, who was also deceased, personal loans from relatives, and the return of a good part of his salary from 1952 to 1966 to Irving Talve (T. 510, 513, 519-545, 565-582).

Concerning the outside accounting income, which appellant conceded went unreported, appellant testified that he was so traumatized by personal problems arising from marital difficulties, health problems and the separation from his former best friend, Irving Talve, that he inadvertently omitted this income from both returns (T. 779, 941).

C. The Government's rebuttal case.

In rebuttal, the Government called Charles Schwartz, a client of appellant, who testified that he paid appellant accounting fees in 1964 and 1967. Those fees, however, were not reported on either appellant's 1964 or 1967 income tax returns (T. 954, 960; see Gov't. Exs. 36, 43, 45, 46). Another client, Abraham Stern, also testified to accounting payments to appellant in 1967, also unreported (T. 1068; Gov't. Ex. 43).

Patricia Gillespie, an I.R.S. attorney, testified that she interviewed appellant in the presence of his attorney, Mr. Rao, on August 20, 1970. Her memoranda concerning appellant's explanations at the time was offered into evidence

(Gov't. Ex. 37). This showed that appellant, in August of 1970, gave a version of his source of funds for the loans substantially at odds with his testimony at trial.*

Fred Dubin, the I.R.S. agent assigned to the investigation of appellant, testified to another conference with appellant and his attorney, at which appellant gave still another explanation concerning both the amount he allegedly loaned to the Talves, his source of funds for such loans and the timing of such loans (T. 1040-1045).**

ARGUMENT

The District Court properly interrupted defense counsel's summation.

Appellant's contention, basically, is that he was prevented from presenting the "crucial theory" (App. Br. p. 16) of his case, by the Court's limiting his comments during summation. Appellant states that it was critical to his theory of the case to argue that an alleged "mysterious" $295,000 in corporate funds had been transferred by the Talves' to a Swiss bank account, and that this inference was supported by an alleged disappearance of $295,000 shown by the corporate accounts. He contends that a new trial is necessary.

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* At trial, appellant testified that the gift from his father was spread over some ten years, whereas he told Mrs. Gillespie in 1970 that it was a lump sum gift. Additionally, at trial he testified that he had loaned over $170,000 to the Talves and their corporations, while in 1970, he told Mrs. Gillespie that the total advanced was $108,500.

** Dubin also testified that the severance checks were traced into appellant's personal savings or checking accounts.

The United States believes that appellant's contention lacks merit for the following reasons:

1) The specific comments were unsupported by the evidence and amounted to testimony by counsel;

2) Counsel was not, in any event, deprived of presenting his theory of the case, and in fact, did so at length;

3) The "mysterious $295,000" was so remotely connected with the theory of the defense, which was that the admitted payments were the returns of loans, that any infringement on that line of argument was harmless error, in view of the overwhelming evidence of guilt.

(1)

Citations are unnecessary for the maxim that the trial court has broad discretion in regulating the conduct of a trial. This discretion includes the duty to keep counsel's argument within the proper bounds and to insure that the jury is not mislead. As Chief Judge Bazelon said in *United States* v. *Sawyer,* 443 F.2d 712, 713-714 (D.C. Cir. 1971):

> "In regulating the scope of argument, the court should be guided by criteria that are related to the function of argument, i.e., to help the jury remember and interpret the evidence. The prosecutor and the defense counsel in turn must be afforded a full opportunity to advance their competing interpretations, and to emphasize the principles of law that favor their respective positions. The court should exclude only those statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury."

A brief review of what actually happened here will establish that the argument defense counsel sought to propound to the jury was not only unsupported by the

evidence, but was misleading, confusing, and, in fact, irrelevant.

Defense counsel's statement, "Well, I'll tell you where $295,000.00 went. It went, and if the Internal Revenue wants to know, let them go to Switzerland and let them take a look at the Dorvolto account" (T. 1183), contains a plethora of dubious assumptions, none of which are supported by the evidence. Exhibits GG1-GG5 merely purport to show that some $358,000 was transferred from a Swiss bank account in the name of Dorvolto, a foreign corporation to the bank's New York Office, in the early part of 1966. No evidence was offered shedding any light whatsoever on the source of the funds prior to the above transfer.

Defense counsel's statement appears also to have been designed to imply that Mr. Spector, the independent accountant, was somehow involved in concealing this transfer by manipulation of the books of the firm. Such a contention overlooks the uncontested fact that Spector only came to have any relationship with the Talves months after the transfer referred to in GG1-GG5. Additionally, Spector testified clearly that the only adjustment made by him was to correct an inaccurate entry of appellant's which resulted in decreasing the accounts payable of the firm by $100,000. Mr. Spector, although cross-examined extensively, was not asked one question concerning any "missing $295,060", even though this is now characterized as the "major revelation" and "crux" of the case (App. Br., p. 15).

As is apparent from the context of the offer into evidence of GG1-GG5, they were offered to show that Irving Talve was involved with Dorvolto, and that Berliner received mail relative thereto at his private office. Any further mileage sought to be gained from these exhibits is totally unsupported by any testimony whatsoever. Irving

Talve was cross-examined extensively. Not once was he, or either of the other Talve brothers, asked about the $378,000 referred to in GG1-GG5 (the "crux" of the case). Moreover, appellant himself, although his testimony covered some 500 pages of this trial record, uttered not one word relative to such a transfer, though he had a thorough familiarity with all aspects of the Talves' business.

It is also quite obvious that the entry into evidence of these exhibits could not have been perfected over a hearsay objection, for hearsay they clearly were. The fact that no such objection was made is only further indication of the fact that they were admitted not for their substance, but for their existence, i.e.; as a letter written to appellant at his office dealing with the Talves' foreign corporation. To bootstrap their content, which was never read or summarized to the jury, into showing something more significant was clearly disingenuous, to say the least.

The "missing $295,000" is purportedly shown by the testimony of appellant. The Government respectfully refers the Court to appellant's testimony on this point from page 867 to and including page 870, which indicates clearly that appellant used this testimony as a means to avoid cross-examination on the entries made at a time when the books were under his control by questioning the authenticity of the books rather than to show the jury that they indicated some embezzlement, or other misappropriation of funds. Certainly, it would have at least been mentioned on direct examination had it played any significant role in the defense theory of the case.

In sum, Judge Platt's statement that there was no evidence showing that $295,000 of corporate funds were deposited in a Swiss account in this case was totally accurate.*

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* The cases cited by appellant in his brief shed little light on the issue here. Apparently, they are included for their language

[Footnote continued on following page]

(2)

Appellant's characterization of the closed line of argument as being that of a "critical area", and the "crux" of his case, are simply not borne out by the facts.

In his summation, counsel characterized the alleged reluctance of the Talve brothers to disclose information concerning foreign corporations as the "major revelation" in the case (T. 1149-1151). Immediately afterwards, counsel described his view of the "crux" of the case. It had nothing to do with the "missing $295,000", it had nothing to do with Def. Exs. GG1-GG5, but was, rather that Berliner had allegedly advanced $78,000 for the foreign corporations, and this was why the Talves were, according to appellant, hiding their connection with them (T. 1151, 1152).

It is quite obvious from the summation as a whole that appellant's theory of the case was that the payments to

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generally supporting the proposition that counsel may argue inference to the jury. The Government does not dispute this in any manner. However, it is clear that the inferences must be based upon evidence in the record, and not be so attenuated as to mislead the jury. (See *United States* v. *DeAngelis*, 490 F.2d 1004, 1101 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974). Ironically, *Johnson* v. *United States*, 347 F.2d 803 (D.C. Cir. 1965), from which appellant extracts part of one sentence, will be more enlightening if we see the entire paragraph.

> "Ordinarily, counsel has the right to comment on any matter brought to the attention of the jury. Closing arguments may also focus on the failure of defense witnesses to explain certain incriminating circumstances, or the opposing party's failure to call as witnesses persons peculiarly within his control. It is elementary, however, that counsel may not premise arguments on evidence which has not been admitted. Here the evidence on which the prosecutor predicated his argument to the jury, even if formally tendered to the court, could not have been admitted over objection."

Johnson v. *United States*, *supra*, at p. 805.

Berliner represented the repayment of loans, rather than income. This was pursued and argued at length, without limitation. It is the Government's position that this belated attribution of significance to an unwarranted, and unsupported remark, promptly and properly curtailed by the Court, was an afterthought.

(3)

Lastly, it must be kept in mind that this was an income tax evasion case. The Government offered direct evidence showing the receipt of specific items totalling some $175,000 over two years by the appellant. The Government traced this money into the appellant's personal bank accounts. He omitted to report either the severance pay or the accounting fees. Appellant testified that these severance payments were not income, but were the repayment of loans, and that the accounting fees went unreported through an inadvertent omission. This explanation, and nothing else, was the "crux" of the case. The jury considered this explanation propounded over two and a half days on the witness stand and covering some 500 pages of testimony (none of which dealt with a transfer of these funds to Switzerland) and rejected it.

White v. *United States,* 394 F.2d 49, (9th Cir. 1968) holds that counsel is entitled to argue to a jury how evidence is best to be received. The Government does not dispute this in any way. Obviously, the only issue here is whether this particular argument was supported by evidence at all, or whether it invited the jury to engage in totally speculative guesswork. Another and probably more basic, question is, even assuming that such an invitation to pure speculation is not within the discretion of the court to proscribe, what is the impact of the jury's final conclusion on the matter? Will the end result of such an endeavor on their part shed any light on the issues to be decided. Is it relevant? Clearly, in this case these questions must be answered in the negative.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: January 10, 1975

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says tha

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State of New York, a BRIEF FOR APPELLEE

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Paul P. Rao, Jr., Esq.
233 Broadway
New York, N. Y. 10007

Evelyn

Sworn to before me this
10th day of January, 1975.

Olga S. McKeown
Notary Public, State of New York
No. 24-4501536
Qualified in Kings County
Commission Expires March 30, 197

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